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Before The

FEDERAL COMMUNICATIONS COMMISSION

Washington, D.C. 20554

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OFFICE OF SECRETARY

In the Matter of)
)
Implementation of the Local Competition) CC Docket No. 96-98
Provisions in the Telecommunications Act)
of 1996)

TO: The Commission

COMMENTS OF COMPETITIVE TELECOMMUNICATIONS ASSOCIATION

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Genevieve Morelli
Vice President and
General Counsel
Competitive Telecommunications
Association
1140 Connecticut Avenue, N.W.
Suite 220
Washington, D.C. 20036
(202) 296-6650

Robert J. Aamoth
Wendy I. Kirchick
Reed Smith Shaw & McClay
1301 K Street, N.W.
Suite 1100 - East Tower
Washington, D.C. 20005
(202) 414-9210

Counsel for Competitive Telecommunications Association

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COMMENTS OF COMPETITIVE TELECOMMUNICATIONS ASSOCIATION

The Competitive Telecommunications Association ("CompTel"), by its attorneys, hereby submits these comments in response to the Notice of Proposed Rulemaking (FCC 96-182) [hereinafter "NPRM"] to implement the Telecommunications Act of 1996 [hereinafter "1996 Act"] released by the FCC in the above-captioned proceeding on April 19, 1996.

Summary

I. MINIMUM NATIONAL RULES

Congress established a new regime for carriers to obtain services and facilities from each other on a co-carrier, jurisdictionally unseparated basis. The FCC must adopt the rules necessary for all carriers, not just certain classes of carriers, to implement the co-carrier regime in Section 251 to promote efficient competition in all market segments.

Section 251(d) is a plenary grant of authority for the FCC to adopt the explicit national rules necessary to implement Section 251. The 1996 Act will not work without them. National uniformity is necessary to establish business certainty, limit the ability of ILECs to delay and frustrate the negotiation process, minimize litigation and regulatory proceedings to implement Section 251, and facilitate new entry on a region-wide or national basis.

Minimum national rules do not detract from the seminal role of states and state commissions in implementing the Act. States will continue to wield the lion's share of jurisdiction under the Act by arbitrating and approving agreements, estblishing rate levels, adopting their own rules and policies, and verifying the Bell Companies' compliance with the competitive checklist for in-region interLATA entry.

II. UNBUNDLED NETWORK ELEMENTS AND LOCAL EXCHANGE RESALE

Based on consumer demand, many carriers are moving quickly to become full-service providers for their end-user customers. The full-service market will be no more competitive than its weakest link, local services. Long distance carriers will not have a meaningful chance to become full-service providers unless the FCC requires ILECs to unbundle network elements and provide the operational and back-office support necessary for carriers to combine elements into services under Section 251(c)(3). Because ILECs can purchase long distance transmission capacity at cost-based wholesale rates with mature, tested support capabilities, they will dominate full-service competition unless other carriers can provide local services by purchasing network elements.

The FCC should require ILECs to unbundle at least 16 different network elements, including the elements necessary for carriers to have unmediated access to the ILEC's logical networks. All network elements are important, but none can work without an unbundled local switching ("ULS") element that is more than a mere unbundled port. The FCC must require the ILECs to create a ULS element as the virtual lease of switching capacity. It must give carriers a switch platform for developing their own local services without building local loops and for interconnecting with non-ILEC networks. Unbundled ports are plainly insufficient because they cement reliance upon the ILEC's local network and services.

The FCC must adopt rules requiring all ILECs to develop PIC-like procedures so that carriers can turn up new local customers as quickly, efficiently and inexpensively as ILECs can turn up new customers in the long distance market. Comprehensive nondiscrimination rules are essential under Section 251, and the FCC should make clear that the Bell Companies do not satisfy the competitive checklist for in-region interLATA entry until they comply fully with those and other policies under Section 251.

Purchasing network elements under Section 251(c)(3), and obtaining local exchange retail services at wholesale rates under Section 251(c)(4), are discrete options for carriers to enter the local market. By purchasing network elements, a carrier replaces the ILEC as the end user's local exchange carrier and becomes responsible for all local exchange and exchange access routed to and from that customer. The carrier also obtains the ability to combine network elements into services of its own design. By purchasing local exchange services at wholesale rates, a carrier replaces the ILEC for local exchange service, but not for exchange access, and it loses the ability to design its own services. Both options are essential to a competitive full-service market.

III. EXCHANGE ACCESS.[1]

Section 251(c) is a plenary entitlement for every carrier to obtain interconnection and network elements from ILECs as co-carriers on a jurisdictionally unseparated basis. Section 251(c)(2) does not exclude interexchange carriers. The plain language entitles all carriers to obtain stand-alone exchange access for their own long distance services. The statute requires ILECs, not requesting carriers, to "offer[]" exchange access, as they all do. Any attempt to write interexchange carriers out of that section will fail, as the market will

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1 For convenience of reference, and to reflect Congress' use of the term in the 1996 Act, CompTel will use "exchange access" as a short-hand reference for one carrier's origination or termination of <u>toll</u> traffic on another carrier's network. However, the broader term "interconnection" is more relevant and accurate because it reflects the arrangements between carriers for originating and terminating <u>all</u> traffic on each other's networks.

develop lawful mechanisms for carriers to obtain exchange access through co-carrier arrangements. Congress did not intend for the industry to waste enormous resources in proving the ultimate futility of attempting to erect entry barriers around Section 251(c)(2).

The FCC's carrier-to-customer access charge regime is not relevant to the proper interpretation of the new co-carrier regime under Section 251(c). Congress preserved the FCC's full authority over that regime in Section 251(i). Carriers have the option of obtaining exchange access on a co-carrier basis under Section 251(c) or as customers of the ILECs under the intrastate and interstate access tariffs.

CompTel proposes an interim plan to allay any concerns that the ILECs will seek to recoup lost exchange access revenues by raising local rates. This plan is contingent upon the FCC interpreting Sections 251-252 to entitle all carriers to obtain stand-alone exchange access from ILECs on a co-carrier basis at rates based on economic costs (TSLRIC). For an interim period ending when the FCC completes the universal service proceeding in CC Docket No. 96-45, the FCC would waive its requirement for TSLRIC prices so that long distance carriers would continue to pay intrastate and interstate access charges for stand-alone exchange access under Section 251(c). This interim plan would not apply when carriers replace the ILECs as a customer's local exchange carrier through the purchase of network elements. Under this plan, the Bell Companies cannot enter the in-region interLATA market until they fully implement TSLRIC pricing for exchange access and comply with other applicable requirements.

IV. PRICING

Sections 251(c) and 252(d) require interconnection and network element rates to be based on economic costs. The FCC should adopt Total Service Long Run Incremental Costs (TSLRIC) as the best available economic-cost methodology. All costing methods based upon historical costs, excess revenues, or price caps are expressly prohibited by Section 252(d). The FCC should consider working with the Federal-State Joint Board to adopt benchmark TSLRIC-based rates for interconnection and network elements that would apply nationwide except where good cause exists for TSLRIC-based state-specific rates.

Sections 251(c)(4) and 252(d)(3) require ILECs to establish local exchange wholesale rates by removing all retail costs from their retail rates. The FCC should adopt a methodology based upon the Uniform System of Accounts for calculating avoided retail costs. The FCC should consider working with the Joint Board to establish benchmark wholesale reductions based on ARMIS data that would apply nationwide unless more accurate, ARMIS-based reductions can be calculated on a state-specific basis. Except for the single statutory restriction on reselling services limited to a specific category of customers, the FCC should clarify that all retail services, as well as all promotions, discounts or other options, are subject to resale under Section 251(c)(4).

Introduction

This rulemaking may be the most important that the FCC has ever conducted. The NPRM raises one issue after another which could easily justify their own rulemaking proceedings, but which the FCC must address at the same time in this docket under the accelerated timetable of the 1996 Act. In these comments, CompTel provides the FCC with its views on many of the legal, regulatory, policy and factual issues raised in the NPRM. While these issues reach to virtually every corner of the industry, there are several common threads that tie them all together. As the FCC reviews thousands of pages of comments and submissions, CompTel urges the FCC to keep the following ten principles in mind to ensure that it never loses sight of the forest that Congress intended to grow when it planted the seeds of efficient competition in the 1996 Act.

1. Do The Right Thing Now.

The FCC has a unique window of opportunity to adopt the statutory interpretations and implementing rules that will ensure an economically efficient telecommunications industry in all market segments for decades to come. This chance may never come again. The FCC should not settle for "second-best" solutions or adopt rules that mediate competing industry interests rather than implement Congress' desire (and the consumers' need) for a fully competitive telecommunications industry. The FCC should only adopt "first-best" solutions, including TSLRIC pricing for interconnection and unbundled network elements under Section 251(c). The 1996 Act requires that the FCC ignore the siren call from certain industry interests to subvert the economic and allocative efficiency that justifies TSLRIC pricing by loading load excess revenues onto TSLRIC rate levels. TSLRIC rates are an end point for efficient pricing, not a starting point.

2. Interpret The Act According To Its Language.

It is imperative that the FCC interpret the 1996 Act according to the plain words used by Congress whenever possible. The FCC should not shy away from reading the statute as it is written due to concerns that it will take the industry in new directions. Based on consumer demand, the industry is already moving rapidly towards an environment where many carriers will compete against each other as full-service providers. Interpreting the statute according to its plain words is the best way of ensuring that this competition develops free from restrictions that Congress did not intend.[2]

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[2] Also, a plain-language interpretation maximizes the likelihood that the FCC's decision on or before August 8, 1996 will survive judicial review under the Chevron doctrine, thereby avoiding the harmful uncertainty and delay that would occur if portions of the FCC's decision are remanded to the agency for further consideration. Chevron, U.S.A. v. Natural Resources Defense Council, 467 U.S. 837, 842-843 (1984).

3. Avoid Going "Back To The Future."

The FCC should avoid writing into the legislation or its rules past distinctions between carriers and services which will not survive in the new market environment. For example, terms like "toll" and "local" will not have meaning in an industry where carriers and consumers develop new ways of providing, pricing and marketing services. In a co-carrier environment, all carriers must have the same entitlement to obtain interconnection or network elements from ILECs for all traffic under Section 251(c). Otherwise the FCC will be regulating distinctions between carriers and services that have no validity in the marketplace, necessitating arbitrary, complex regulatory regimes contrary to Congress' express desire for a more deregulatory industry.

4. Err On The Side Of New Entry And Competition.

The overriding purpose of the 1996 Act was to create a more competitive industry by establishing multiple options for carriers to enter all market segments (especially local services) whenever it is efficient to do so. When confronted with competing interpretations of the Act or proposed rules to implement the Act, the FCC will hardly ever go wrong if it adopts the interpretation or rule that is most compatible with open markets and the removal of entry barriers.

5. Rules Can Be Pro-Competitive and Deregulatory.

The FCC correctly recognizes that adopting explicit national rules to implement Section 251 is essential to securing Congress' objective of a more competitive and deregulatory telecommunications industry. Explicit national rules will remove harmful uncertainty over how the 1996 Act will apply on a going-forward basis, while establishing the uniformity necessary to promote new entry, facilitate negotiations with ILECs, provide guidance to carriers and state commissions for the arbitration and review process, and limit the opportunities for the ILECs to drag their feet in implementing the core provisions in Sections 251 and 252.

6. Congress Has Established A New Paradigm.

For years ILECs have provided stand-alone exchange access services to interexchange carriers on a jurisdictionally separated, carrier-to-customer basis through ILEC-initiated tariffs subject to Section 203 and the FCC's rules in Part 69. Congress established Section 251 so that carriers could obtain facilities and services from each other on a jurisdictionally unseparated basis through carrier-to-carrier (or co-carrier) arrangements. A competitive full-service environment inherently requires cost-based, carrier-to-carrier pricing of the ILEC's network, and the FCC should not adopt interpretations or rules which perpetuate past pricing and carrier distinctions contrary to market forces,consumer interest and Congress' intent.

7. The Ultimate Litmus Test Is "Does It Work?"

The FCC's rules must actually work in the marketplace if they are to implement Congress' objectives in adopting the 1996 Act. It is meaningless for the FCC to specify network elements if carriers cannot combine those elements into their own services, as required by Section 251(c)(3). Nor can new carriers enter the local market pursuant to Section 251(c) if PIC-like procedures are not in place for them to turn up new local customers as quickly, efficiently and inexpensively as ILECs can turn up new customers in the long distance market. The co-carrier regime established by the 1996 Act must furnish actual as well as theoretical options for entering the local market.

8. The 1996 Act Affects All Markets.

Congress did not adopt the 1996 Act solely to promote competitive entry into the local market. Its desire was to ensure competitive entry options for all carriers in all market segments. The imminent onset of full-service competition will tie together competitive conditions in all markets, with the result that the full-service market will only be as competitive as the least-competitive service offered by rival providers. Carriers must have efficient entry options to local services in competition with the ILECs, or else long distance and other market segments will become substantially less competitive than they are today.

9. Do Not Prejudge Outcomes.

The FCC should not interpret the 1996 Act or adopt implementing rules based upon any prediction or preference regarding which carriers or entry options should be most successful in the post-Act environment. Congress created multiple options for carriers to enter new markets, and the FCC's objective should be to ensure that all carriers have the same ability to choose among all entry options for all market segments at economically efficient rates. Subject only to cost-based deviations, all carriers should pay the same rate when they purchase the same service or facility from the same ILEC. As long as the FCC adopts rules to ensure efficient entry options for carriers, the market will assure that consumers have the widest range of choices at the lowest rates.

10. Bargaining Leverage Is Unequal.

Congress' goal of competition through efficient entry is far from being achieved in the local market. The ILECs continue to possess monopoly power through their control over bottleneck local exchange facilities. The ILECs have enormous bargaining power over other carriers when negotiating co-carrier arrangements, and they have the incentive and ability to engage in negligent, dilatory, discriminatory, error-prone or other obstructionist behavior to prevent the new co-carrier regime from enabling competing carriers to enter the local market. The FCC must adopt explicit rules to control such behavior and institute reporting requirements for monitoring compliance. For the Bell Companies, the FCC must make clear that they cannot enter the in-region interLATA market until they have complied in full with the rules and policies necessary to implement Section 251(c).

I. THE FCC MUST ADOPT EXPLICIT NATIONAL RULES TO IMPLEMENT SECTION 251 OF THE 1996 ACT

A. The FCC Has Authority to Adopt Explicit National Rules Implementing Section 251

[NPRM, paras. 25-33.] The FCC has express statutory authority to adopt the explicit rules necessary to implement Section 251. Section 251(d)(1) requires that, "within 6 months after the date of enactment of the Telecommunications Act of 1996, the Commission shall complete all actions necessary to establish regulations to implement the requirements of this section."[3] The NPRM correctly recognizes that this specific directive "make[s] clear that Congress intended the FCC to implement a pro-competitive, de-regulatory, national policy framework envisioned by the 1996 Act."[4] The rulemaking authority granted by Section 251(d) is not limited in any manner and, therefore, should be construed broadly as a grant of plenary authority to adopt rules implementing Section 251. Further, interpreting the 1996 Act as granting the FCC authority to adopt

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[3] 47 U.S.C. § 251(d)(1).

[4] **NPRM at para. 26** (citing S. Conf. Rep. No. 104-2320, 104th Cong., 2d Sess 1 (1996) (Joint Explanatory Statement)).

explicit national rules is consistent with Congress' intent to provide a uniform national policy framework to promote competition in intrastate and interstate telecommunications markets.

The FCC also has authority to implement the 1996 Act pursuant to Section 4(i) of the Communications Act.[5] This provision states that "[t]he Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions."[6] Similarly, Section 201(b) authorizes the FCC to "prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this Act."[7] Sections 4(i) and 201(b) serve not only as authority to adopt rules and policies to implement Section 251 within six months, but as authority in conjunction with Section 251(d) to conduct ongoing proceedings to adopt rules and policies implementing Section 251 and other provisions of the 1996 Act.

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5 47 U.S.C. § 154(i).

6 Id. The authority granted by this section has been construed broadly by the FCC. See, e.g., Local Exchange Carrier Access Tariff Rate and Earning Levels, 5 FCC Rd. 1070 (1990) (Section 4(i) gives FCC "broad authority to effectuate [the statute's] provisions and to penalize those who violate them."); see also AT&T v. Northwestern Bell, 5 FCC Rcd 143 (1990); MCI v. Pacific Northwest Bell, 5 FCC Rcd 216 (1990).

7 47 U.S.C. § 201(b).

B. The 1996 Act Gives The FCC Jurisdiction Over The Co-Carrier Services And Facilities Subject To Section 251 On An Unseparated Basis

[NPRM, paras. 2, 37-40, 120.] The 1996 Act creates a new alignment of jurisdiction that did not previously exist in the statute.[8] In Sections 251-252, Congress has established a new regime whereby carriers obtain services and facilities from each other on a jurisdictionally unseparated basis pursuant to co-carrier arrangements. The co-carrier regime is fundamentally different than any regime that either Congress or the FCC has established in the past, and it is completely outside the rules, policies and precedents governing the pre-existing carrier-to-customer regime of jurisdictionally separated intrastate and interstate services and facilities.

The 1996 Act clearly establishes the co-carrier regime on a jurisdictionally unseparated basis. Section 253 expressly grants the FCC authority to preempt state or local statutes or regulations that impede entry into any market for "interstate or intrastate telecommunications service."[9] Further, Section 251(d) requires the FCC to adopt rules implementing Section 251(c),

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8 See 141 Cong. Rec. S7881-2, S7886 (June 7, 1995) (Statement of Sen. Pressler) ("We need to devise a new national policy framework - a new regulatory paradigm for telecommunications - which accommodates and accelerates technological change and innovation.").

9 47 U.S.C. §§ 253(a), (d) (emphasis supplied); see also 141 Cong. Rec. S7906 (June 7, 1995) (Remarks of Sen. Lott) (key objective of 1996 Act to address "local and long distance issues").

which in turn applies in subsection (c)(2) to co-carrier interconnection arrangements for the routing of telephone exchange service and exchange access; in subsection (c)(3) to the purchase of unbundled network elements through co-carrier arrangements for the provision of any "telecommunications service;" and in subsection (c)(4) to the purchase of local exchange services by carriers at wholesale rates. Section 252(e)(5) requires the FCC to assume the duties of a state commission which fails to act to carry out its responsibilities to review, arbitrate and approve agreements. These provisions repudiate any interpretation of the 1996 Act as limiting the FCC's jurisdiction over co-carrier arrangements to interstate services.[10] Therefore, the FCC should affirm that the 1996 Act establishes a new co-carrier regime on a jurisdictionally unseparated basis under Sections 251-252.

C. The 1996 Act Strikes a Balance Between The FCC's And The States' Roles in Implementing Section 251

By entrusting the FCC with the responsibility for establishing regulations to implement Section 251, Congress intended to establish a proactive role for the FCC in creating

[10] CompTel agrees with the FCC's tentative conclusion **[NPRM, para. 40]** that Congress did not see the need to amend Section 2(b) because Section 251 established a new co-carrier regime in addition to, not in place of, the existing regime of jurisdictionally separated intrastate and interstate services and facilities provided on a carrier-to-customer basis.

the pro-competitive telecommunications market envisioned by Congress. The 1996 Act recognizes the public interest in broad-based telecommunications competition under consistent national policy principles that will govern carriers' rights and obligations under Section 251 subject to oversight by the FCC and federal courts. By directing the FCC to adopt rules implementing Section 251 within six months, Congress indicated that it desired the FCC to establish the initial regulatory framework without which carriers and state commissions could not move forward to implement the new co-carrier regime.

At the same time, the 1996 Act and the NPRM create a seminal role for the states to play in developing competition in local, intrastate and interstate markets. The adoption of explicit national rules by the FCC in carrying out its responsibilities under Section 251(d)(1) does not compromise the complementary role played by state commissions and legislatures. State commissions have the authority to (i) approve agreements between ILECs and requesting carriers established through negotiations and/or arbitration;[11] (ii) arbitrate open issues between the parties and impose conditions, consistent with Section 251 and the FCC's regulations thereunder;[12] (iii) determine the just and reasonable rates for interconnection under Section 251(c)(2), network elements under Section 251(c)(3), and

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[11] 47 U.S.C. § 252(e).

[12] 47 U.S.C. §§ 252(b)-(c).

wholesale local exchange rates under Section 251(c)(4), consistent with the national framework established by the FCC under Section 251;[13] (iv) adopt additional rules and policies which do not conflict with the 1996 Act or the FCC's regulatory framework;[14] and (v) consult with the FCC to verify whether a Bell Company has complied with the competitive checklist as a precondition for entering the in-region interLATA market under Section 271.[15]

The new jurisdictional alignment with respect to co-carrier arrangements under Section 251 relies upon the states at least as much as the FCC. While the FCC must establish the overall regulatory framework necessary for the industry to move forward with implementing the new co-carrier regime, the states gain jurisdiction over interstate services and facilities for the first time. Given the primary role of state commissions in reviewing, arbitrating and approving co-carrier arrangements, as well as establishing the "just and reasonable" rates for such arrangements, the states will be powerful partners with the FCC in implementing the 1996 Act.

The FCC affirmed in the NPRM that "[t]he adoption of explicit national rules to implement section 251 would not necessarily undermine the initiatives undertaken by the various

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[13] 47 U.S.C. § 252(d).

[14] 47 U.S.C. § 251(d)(3).

[15] 47 U.S.C. § 271(d)(2)(B).

states. **[NPRM, para. 29.]** Indeed, the FCC has contemplated that its national rules would build or be modeled upon existing state actions, statutes or regulations pertaining to "interconnection and other issues related to opening local markets to competition" where such rules would be consistent with the 1996 Act. **[NPRM, para. 29.]**

D. Explicit National Rules Implementing Section 251 Are Both Pro-Competitive and Deregulatory

[NPRM, paras. 25-35, 50-51, 67, and 79.] The FCC's establishment of explicit national rules governing Section 251 is both pro-competitive and deregulatory. Such rules will facilitate the negotiation and arbitration process by establishing ground-rules in advance regarding the co-carrier arrangements that ILECs must establish under Section 251(c). Clear ground-rules will blunt any ILEC strategy (which is already reflected in their conduct to date)[16] to expand the range and number of contested issues in these negotiations. Carriers will better be able to fulfill their statutory obligations when they adequately understand the scope of the parties' respective rights and duties, and the states' arbitration decisions will be more informed and uniform. The more definition that the FCC can bring to Section 251 now, the less need there will be for subsequent

[16] For examples of the tactics employed by the ILECs to date, see Appendix A & B to the comments filed today by the Telecommunications Carriers for Competition. See also infra, this section.

litigation and regulatory proceedings before the FCC, state commissions and federal courts. The role of federal and state regulators can be substantially reduced through explicit national rules.

In addition, minimum national rules are necessary to establish the state-by-state uniformity that facilitates entry into local markets in multiple jurisdictions. Particularly for carriers who wish to purchase network elements and combine them into their own services under Section 251(c)(3), it is imperative for carriers to have a single regulatory framework applicable in all states. Local entry will be stifled if network elements vary from state to state, or if the manner in which they can be combined into services varies from state to state. In addition, explicit national rules are necessary for carriers who desire to configure regional or national networks. Inconsistent state rules and laws will create inefficiency by hindering a new entrant's ability to deploy more cost effective and reliable alternative network architectures, and increase start-up costs by requiring new entrants to comply with a multiplicity of state variations in technical and procedural requirements. **[NPRM, paras. 30, 50-51.]**

Minimum national rules also are essential for the prices to be charged by ILECS for interconnection, unbundled network elements, and wholesale local exchange services under